INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	5
Appendix	6

CITATIONS

Cases:	
Burnham v. *Commissioner*, 86 F. (2d) 776, certiorari denied, 300 U. S. 683	4
Commissioner v. *Segall*, 114 F. (2d) 706, certiorari denied, April 7, 1941, Nos. 828–829, present Term	4
Cortland Specialty Co. v. *Commissioner*, 60 F. (2d) (C. C. A. 2d), certiorari denied, 288 U. S. 599	4
Helvering v. *Buchsbaum*, 308 U. S. 527	4
Helvering v. *Tyng*, 308 U. S. 527	4
Helvering v. *Watts*, 296 U. S. 387	4
LeTulle v. *Scofield*, 308 U. S. 415	4
Pinellas Ice Co. v. *Commissioner*, 287 U. S. 462	3, 4
Statute:	
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 111	6
Sec. 112	6
Sec. 113	7

317948—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 977

MARJORIE FLEMING LLOYD-SMITH, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 18–33) is reported in 40 B. T. A. 214, and that of the Circuit Court of Appeals (R. 66–71) in 116 F. (2d) 642.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 22, 1941 (R. 72). The petition for a writ of certiorari was filed on April 22,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer transferred assets to a corporation in exchange for its stock and a two-year promissory note. The question presented is whether the basis for computing gain upon subsequent sale of the note is its value when received or a proportionate amount of the basis of the transferred assets. The answer to this question in turn depends upon whether the note is a security within the meaning of Section 112 (b) (5) of the Revenue Act of 1932, or whether it is "other property" within the meaning of Sections 112 (e) and 113 (a) (6).

STATUTE INVOLVED

The statute involved is set forth in the Appendix, *infra*, pp. 6–8.

STATEMENT

The findings of the Board of Tax Appeals (R. 19–27) with respect to the only issue now in controversy may be summarized as follows:

In 1932, the taxpayer transferred certain assets to the Jorwil Corporation in return for all of its capital stock and its unsecured two-year 6% promissory note for $303,000. In 1933, the note was divided into two obligations, one for $70,000 and the other for $233,000. The same year the $70,000 note was sold for $70,000 in cash (R. 23, 27).

The assets transferred to the Jorwil Corporation had a cost basis of $2,636,778.49 to the taxpayer, but their value at the time of the transfer was $477,606.19. On the theory that the basis of the note should be determined by allocating the original $2,636,778.49 basis between the note and the stock of Jorwil Corporation in proportion to their relative fair market values at the time of the transfer, the taxpayer claimed a basis of $386,458 for the note sold and, accordingly, a deductible loss of $316,458 on that sale (R. 27).

The Commissioner disallowed the loss on the ground that the basis of the note was $70,000, its value when received, and assessed a deficiency accordingly (R. 9). His determination was upheld by the Board of Tax Appeals (R. 18–33), and the Circuit Court of Appeals for the Second Circuit affirmed (R. 67–71).

ARGUMENT

1. The court below held that the note was not a security within the meaning of Section 112 (b) (5), and that it was therefore "other property" under Section 113 (a) (6), having a basis "equivalent to its fair market value at the date of the exchange." The decision is in accord with *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462, holding that short term notes are not "securities" within the meaning of corresponding nonrecognition provisions of the revenue acts. *Cortland Specialty Co.* v. *Commissioner,* 60 F. (2d) 937 (C. C. A. 2d), certiorari

denied, 288 U. S. 599. Cf *LeTulle* v. *Scofield,* 308 U. S. 415; *Helvering* v. *Tyng,* 308 U. S. 527; *Helvering* v. *Buchsbaum,* 308 U. S. 527; *Commissioner* v. *Segall,* 114 F. (2d) 706 (C. C. A. 6th), certiorari denied, April 7, 1941, Nos. 828-829, present Term.

2. The decision below is not, as contended by petitioner, in conflict either with *Burnham* v. *Commissioner,* 86 F. (2d) 776 (C. C. A. 7th), certiorari denied, 300 U. S. 683, or with *Helvering* v. *Watts,* 296 U. S. 387.

The *Burnham* case involved an exchange of 10-year obligations for stock which the court itself there treated as distinguishable from the transaction in the *Pinellas Ice Co.* case, which in turn is for present purposes indistinguishable from the instant case. Moreover, the *Burnham* decision must be read in the light of this Court's subsequent decision in the *Le Tulle* case.

The alleged conflict with the *Watts* case is equally without substance. The longer term mortgage bonds there involved were held to be "securities" under the statute and cannot be regarded as cash, as were the short term notes referred to in *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462." 296 U. S. at 389. The obligations in the *Watts* case are thus to be distinguished from the two-year note in the instant case as they were from the short-term obligations in the *Pinellas* case.

CONCLUSION

The decision below is correct, and presents no conflict. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
SAMUEL H. LEVY,
Special Assistants to the Attorney General.

MAY 1941.